

BRB No. 06-0310

BARBARA MOSLEY	)	
(Widow of PERRY MOSLEY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL ASSOCIATES	)	
	)	
and	)	
	)	
EMPLOYERS' INSURANCE OF WAUSAU	)	DATE ISSUED: 12/07/2006
	)	
Employer/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Alexander Karst,  
Administrative Law Judge, United States Department of Labor.

Irene C. Morales, Caitlan C. Watters, and Joseph F. Ramos (Inland  
Counties Legal Services, Inc.), Riverside, California, for claimant.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H.  
Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),  
Washington, D.C., for the Director, Office of Workers' Compensation  
Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and  
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-2112) of Administrative Law Judge Alexander Karst rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The employee in this case died on January 17, 1975, while working for employer. Claimant, his surviving spouse, was subsequently awarded death benefits on behalf of herself and a dependent child by Administrative Law Judge Henry B. Lasky. *See* 33 U.S.C. §909(b). In his decision dated April 28, 1980, Judge Lasky ordered employer and its carrier to pay claimant death benefits for a period of 104 weeks from January 18, 1975, with the Special Fund assuming liability for the payment of said benefits thereafter in accordance with Section 8(f) of the Act, 33 U.S.C. §908(f). As a result, the Special Fund has been making payments to claimant since January 14, 1977.

Under Section 9(b), claimant was entitled to an award on behalf of herself and the dependent child of 66 2/3 percent of decedent's average weekly wage, plus annual adjustments pursuant to Section 10(f), 33 U.S.C. §910(f), continuing, at the latest, until such time as the dependent child reached the age of 23, which occurred on May 2, 1996. 33 U.S.C. §§909(b), 902(14), 902(18). However, as a result of an administrative error on the part of the Director, Office of Workers' Compensation Programs (the Director), claimant continued to receive benefits at 66 2/3 percent of decedent's average weekly wage until November 19, 2003, resulting in an overpayment of \$52,315.71. At that point, claimant's benefits were reduced to 50 percent of decedent's average weekly wage in accordance with Section 9(b).

On December 4, 2003, the Director informed claimant of the overpayment. He also began withholding, at first, \$50 per week, and then subsequently \$25 per week, from claimant's benefits, in an effort to recoup the overpayment. Claimant, citing financial hardship, objected to the reduction in her benefits, and the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Administrative Law Judge Alexander Karst (the administrative law judge) denied claimant's request that the Director be barred from further recovery of its overpayment. He concluded that the Director is entitled to continue reducing future payments of claimant's compensation to recoup the overpayment pursuant to Section 14(j), 33 U.S.C. §914(j).

On appeal, claimant challenges the administrative law judge's finding that the Director is entitled to reduce the payment of benefits in order to recoup his overpayment. The Director responds, urging affirmance.

Claimant argues that the Director should be barred from recovering the overpayment since no order modifying the existing award has been entered. Claimant also contends that the administrative law judge erred by not considering the equitable doctrines of limitation of actions, laches, and detrimental reliance, which she fully raised before him. Claimant maintains that since the administrative law judge's decision is silent on these points, these affirmative defenses are ripe for review by the Board.

Under Section 22 of the Act, 33 U.S.C. §922, any party-in-interest may, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, request modification based on a mistake in fact or change in condition. *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968), *reh'g denied*, 391 U.S. 929 (1968). Initially, contrary to claimant's contention, any Section 22 action would not be time-barred because the payment of benefits in this case is ongoing. Specifically, employer has not made a "last payment" of compensation nor has there been a "rejection of a claim." *See generally Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002); *Moore v. Int'l Terminals, Inc.*, 35 BRBS 28 (2001). In any event, the facts of the instant case do not present a situation requiring the application of Section 22.

Section 9(b) of the Act, 33 U.S.C. §909(b), provides for the payment of one death benefit where a decedent is survived by a spouse and one or more dependent children. *See generally Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). In particular, the benefit includes additional compensation for the decedent's child or children, but it is not considered to be two or more separate benefits. *Id.* Section 9(b) directs that a widow with a dependent child shall receive 66 2/3 percent of decedent's average weekly wage and that compensation at that rate remains payable, at the latest, until such time as the dependent child reaches the age of 23.<sup>1</sup> 33 U.S.C. §§909(b), 902(14), 902(18) (defining a child as a person under age eighteen, or full-time student under age of twenty-three attending an accredited institution). At that point, the widow's entitlement reverts to her statutorily prescribed 50 percent of decedent's average weekly wage. 33 U.S.C. §909(b).

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<sup>1</sup> The Director states he did not investigate whether the son was a "student" after age 18; rather, he decided to stop benefits only as of the child's 23rd birthday.

Judge Lasky's award of death benefits pursuant to Section 9(b) generally incorporates the reduction in benefits subsequently sought by the Director in this case as it reflects the appropriate calculation of entitlement to benefits pursuant to the Act.<sup>2</sup> Lasky Decision and Order at 4. Thus, no modification proceedings were required in order to reduce claimant's compensation in this case, or for the Director to seek reimbursement of the resulting overpayment under Section 14(j), 33 U.S.C. §914(j). We therefore reject claimant's assertion that the Director must proceed via Section 22 in order to recover the overpayment.

Moreover, the Director's lack of diligence in terminating the payment of the child's benefits in a timely manner is insufficient to bar his recovery of the overpayment. As the Director notes, neither Section 14(j) nor any other provision of the Act requires a showing of fault on the part of a claimant to allow either an employer or the Special Fund to recoup an overpayment to which the claimant has no legal entitlement. *See Flynn v. John T. Clark & Sons*, 30 BRBS 73 (1996). Rather, the language of Section 14(j) is clear in that it allows employer, or in this case the Special Fund, to receive a credit for "advance" payments of compensation against any compensation subsequently found due.<sup>3</sup> 33 U.S.C. §914(j); *Flynn*, 30 BRBS 73. Moreover, as the Board has previously recognized, the explicit purpose of Section 14(j) is to enable an employer to recover those funds which it has paid out, and claimant has received, to which it is later found that claimant is not entitled. *Flynn*, 30 BRBS 73; *see also generally Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 22 BRBS 83(CRT) (5<sup>th</sup> Cir.1989), *aff'g* 21 BRBS 233 (1988), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5<sup>th</sup> Cir.1990) (*en banc*).

In *Flynn*, 30 BRBS 73, the claimant and her two minor children were awarded death benefits pursuant to the Act commencing on February 6, 1968. The carrier paid the benefits until November 8, 1990, when it realized that it had been erroneously making cost-of-living adjustments pursuant to a newly enacted Massachusetts workers'

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<sup>2</sup> While Judge Lasky did not explicitly inform the parties that the dependent child's entitlement to benefits would cease at some future point in time, such is the natural conclusion drawn from the facts of this case based upon the clearly delineated formula for calculating benefits under the Act. *See* 33 U.S.C. §909(b).

<sup>3</sup> Section 14(j), 33 U.S.C. §914(j), states:

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

compensation statute, resulting in an alleged overpayment of \$5,099.42. The carrier intended to recoup this overpayment by suspending the payment of benefits to claimant for a total of 445 weeks, or approximately eight and one-half years, and, upon recoupment, to reinstate the benefits. Claimant sought to have her past due benefits paid, her benefits reinstated, and to have the collection of the carrier's overpayment waived. The administrative law judge concluded that the carrier was not entitled to a credit against future benefits owed to claimant for overpayments it mistakenly made after an award was issued. The Board, however, reversed the administrative law judge's conclusion, holding that an employer who is paying benefits pursuant to an award under the Act may credit excess payments it erroneously made under the provisions of a state workers' compensation statute as such payments were "advanced payments of compensation" for purposes of Section 14(j). In this regard, the Board held that the plain language of Section 14(j) does not require that a mistaken overpayment can be recouped only if it is voluntarily made prior to the entry of an award. Rather, the literal language of Section 14(j) merely requires that the payments of compensation be "advance payments." Within the context of Section 14 as a whole, the logical implication of this phrase is that in order for Section 14(j) to apply, a payment is considered to be in "advance" if it is made prior to the date it is "due" under Section 14(b).<sup>4</sup> *But see Cooper/T. Smith Stevedoring Co., Inc. v. Luizza*, 293 F.3d 741, 36 BRBS 18(CRT) (5<sup>th</sup> Cir. 2002) (in holding an overpayment of disability benefits cannot offset death benefits payments, court states that "advanced" payments under Section 14(j) are those made voluntarily, and are not payments made pursuant to an award).<sup>5</sup>

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<sup>4</sup> Section 14(b), 33 U.S.C. § 914(b), states:

The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

<sup>5</sup> We note that this case is distinguishable, initially because, as the court held, disability and death benefits are two distinct statutory benefits. Moreover, in stating that payments following an order are not "advance" payments under Section 14(j), the court relied on the fact that since employer was legally obligated to make the disability payments at issue there, they were not made in advance of any obligation. In contrast, the obligation to pay the benefits at issue here ended by statute upon the child's reaching age 23.

In *Phillips*, 21 BRBS 233, the Board modified the claimant's award with the result that employer had overpaid claimant \$3,200 pursuant to Section 10(f), 33 U.S.C. §910(f), during periods of temporary total disability. The Board ordered the Special Fund, by virtue of employer's entitlement to relief pursuant to Section 8(f), to repay employer for that amount by withholding small increments from future benefits to the claimant until the time that employer was fully repaid as contemplated by Section 14(j) of the Act. The United States Court of Appeals for the Fifth Circuit affirmed the Board's decision in this respect.<sup>6</sup> Specifically, the court looked to the language of Section 14(j) and further addressed congressional intent, stating that

The purpose of Section 14(j) is apparent: If an employer has paid out, and the claimant has received, LHWCA benefits to which it is later found that the claimant is not entitled, the employer should be able to recover those funds. This is a corollary to one of the LHWCA's main purposes, which is to ensure the prompt payment of benefits....

*Phillips*, 877 F.2d at 1234, 22 BRBS at 86(CRT).

The instant case is also akin to the Board's decision in *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999). In that case, employer paid death benefits to the employee's widow on her own behalf and on behalf of her son, who was the deceased employee's stepson. Employer continued to make payments on behalf of claimant's son until his 21<sup>st</sup> birthday, but it was later determined that claimant's son was not a student after his 18<sup>th</sup> birthday and thus was not entitled to benefits pursuant to Section 2(18) after that date. Employer sought, and was awarded by an administrative law judge, a credit for its overpayment against future compensation owed the widow. The Board held that under Sections 14(j) and 9(b) employer was entitled to a credit for any overpayments made to the stepson against its future compensation liability to claimant, and thus affirmed the administrative law judge's finding. Sections 14(j) and 9(b), and the Board's decisions in

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<sup>6</sup> The panel's decision affirmed the Board's reversal of an award of Section 10(f) adjustments during the period claimant was temporarily totally disabled, which resulted in claimant's receiving the overpayment of \$3,200. *Phillips*, 877 F.2d 1231, 22 BRBS 83(CRT). The panel's decision also affirmed an award of Section 10(f) adjustments to claimant's permanent total disability benefits that included adjustments occurring during previous periods of temporary total disability pursuant to *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5<sup>th</sup> Cir. 1981). That portion of the panel decision was subsequently overruled by the Fifth Circuit sitting *en banc*. *Phillips*, 895 F.2d 1033, 23 BRBS 36(CRT). The panel's analysis of Section 14(j) for the initial overpayment is not affected by the *en banc* decision.

*Hawkins*, 33 BRBS 198, and *Lewis*, 19 BRBS 90,<sup>7</sup> therefore support the Director's recovery of the overpayment in this case. *See also Valdez v. Crosby & Overton*, 34 BRBS 185 (2000) (Decision on Recon.) (an overpayment to one survivor may be credited against liability to another survivor).<sup>8</sup>

Furthermore, we reject claimant's assertion regarding the application of the doctrine of laches. The doctrine of laches is an equitable defense barring litigation of a claim that the plaintiff neglectfully or by omission failed to file in a prompt manner, if the lapse of time resulted in prejudice to the other party. *See generally Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4<sup>th</sup> Cir. 1991). The doctrine of laches does not apply to the instant case as the issue here does not concern the filing of an action. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001). Moreover, as the Director asserts, the government is not subject to the defense of laches when enforcing its rights. *United States v. Menatos*, 925 F.2d 333 (9<sup>th</sup> Cir. 1991); *see also United States v. Summerlin*, 31 U.S. 414, 416 (1940).<sup>9</sup>

Lastly, we reject claimant's detrimental reliance argument. A private litigant seeking to estop the government bears a very heavy burden. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5<sup>th</sup> Cir. 1992). A private

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<sup>7</sup> In *Lewis*, the Board held that where a widow filed a death benefits claim while the employer was making death benefits payments to the deceased employee's two surviving children, the claim was timely filed under Section 13(a), 33 U.S.C. §913(a). The Board therefore affirmed the administrative law judge's interpretation of Section 9 as providing for one death benefit. *Lewis*, 19 BRBS at 91-92.

<sup>8</sup> We note that claimant does not challenge the Board's legal interpretation of the relevant provisions of the Act in these decisions. *See* 33 U.S.C. §909(b); *see generally Gilliland v. E.J. Bartells Co., Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259 (9<sup>th</sup> Cir. 2001); *Ferguson v. Southern States, Cooperative*, 27 BRBS 16 (1993); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

<sup>9</sup> Additionally, we reject claimant's assertion that the California statute of limitations should be applied to this case because there is concurrent state and federal jurisdiction. The award in this case was entered pursuant to the Act and therefore the Act's procedural provisions for recovering an erroneous overpayment are exclusive. *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 556, 25 BRBS 92, 97(CRT) (9<sup>th</sup> Cir.), *cert. denied*, 505 U.S. 1230 (1992); *see also Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9<sup>th</sup> Cir. 1993) (ordinarily, when Congress has provided a particular remedy the court will not imply a different one); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5<sup>th</sup> Cir. 1992).

party seeking to establish equitable estoppel must establish not only the traditional legal elements,<sup>10</sup> but also “more than mere negligence, delay, inaction, or failure to follow an internal agency guidelines.” *Id.*, 976 F.2d at 938, 26 BRBS at 110(CRT). We need not examine these elements in detail, as it is clear that claimant’s assertion fails because it cannot be said that she is “ignorant of the facts.” In this regard, claimant stated that she made repeated attempts to make the Department of Labor aware that she no longer had an eligible child in her home, by consistently noting this fact on claimant’s statements to the Department from July 2, 1996, through July 10, 2003. Thus, as claimant had actual knowledge that she was no longer legally entitled to additional benefits on behalf of the child, she cannot establish the requisite elements to support her claim of detrimental reliance in this case.

Consequently, claimant’s contentions are rejected. We affirm the administrative law judge’s finding that the Director is entitled to recoup his overpayment of benefits under Sections 14(j) and 9(b), as it is rational, in accordance with law and supported by substantial evidence. 33 U.S.C. §§914(j), 909(b); *Hawkins*, 33 BRBS 198; *Lewis*, 19 BRBS 90.

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<sup>10</sup> Four elements are necessary: “(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) she must rely on the former’s conduct to her injury.” *Benn*, 976 F.2d at 938, n.13, 26 BRBS at 110(CRT), n.13.



Accordingly, the administrative law judge's Decision and Order Denying Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge